166

Supreme Court, U.S.
FILED

No. 08-356 JUL 17 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL SPIELVOGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM MALLORY KENT
LAW OFFICE OF
WILLIAM MALLORY KENT
1932 Perry Place
Jacksonville, Florida 32207
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com Email

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER IN THE CONTEXT OF A BELATED APPEAL GRANTED UNDER 28 U.S.C. § 2255, LAW OF THE CASE BARS DECISION OF AN ARGUMENT NOT PRESENTED IN THE PRIOR DIRECT APPEAL?

II. WHETHER LAW OF THE CASE FORECLOSES AN ISSUE THAT WAS PREVIOUSLY DECIDED WITHOUT BENEFIT OF A COMPLETE RECORD, THAT IS, WITHOUT BENEFIT OF A TRANSCRIPT OF THE MAGISTRATE JUDGE'S EVIDENTIARY HEARING AT ISSUE?

III. WHETHER *DE NOVO* REVIEW OF THE RECORD OF A MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A CRIMINAL CASE ON THE QUESTION OF THE ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL IS CONSTITUTIONALLY MANDATED AND REQUIRES THE DISTRICT COURT TO REVIEW A TRANSCRIPT OF THE EVIDENTIARY HEARING?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. WHETHER IN THE CONTEXT OF A BELATED APPEAL GRANTED UNDER 28 U.S.C. § 2255, LAW OF THE CASE BARS DECISION OF AN ARGUMENT NOT PRESENTED IN THE PRIOR DIRECT APPEAL?	9
II. WHETHER LAW OF THE CASE FORECLOSES AN ISSUE THAT WAS PREVIOUSLY DECIDED WITHOUT BENEFIT OF A COMPLETE RECORD, THAT IS, WITHOUT BENEFIT OF A TRANSCRIPT OF THE MAGISTRATE JUDGE'S EVIDENTIARY HEARING AT ISSUE?	11

TABLE OF CONTENTS – Continued

Page

III. WHETHER *DE NOVO* REVIEW OF THE RECORD OF A MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A CRIMINAL CASE ON THE QUESTION OF THE ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL IS CONSTITUTIONALLY MANDATED AND REQUIRES THE DISTRICT COURT TO REVIEW A TRANSCRIPT OF THE EVIDENTIARY HEARING? 14

CONCLUSION 16

APPENDIX

Eleventh Circuit Court of Appeals *Order* dated February 7, 2008 ..... App. 1

United States District Court *Order* denying 2255 dated October 25, 2006 ..... App. 9

Eleventh Circuit Court of Appeals *Order* denying rehearing dated April 18, 2008 ..... App. 26

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution ...14, 15, 16

Article III, § 1 2

Due Process Clause of the Fifth Amendment to the United States Constitution 2

CASES

Chambers v. Mississippi, 410 U.S 284 (1973) 7

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993) 4, 5, 6, 13, 14

Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987) 16

Jeffrey S. v. State Board of Education of State of Georgia, 896 F.2d 507 (11th Cir. 1990) 15, 16

Jones v. Barnes, 463 U.S. 745 (1983) 3, 9

Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506 (11th Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 652 (1988) 10

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 3

United States v. Cameron, 907 F.2d 1051 (11th Cir. 1990) 12

United States v. Michael Spielvogel, 264 Fed.Appx. 823 (11th Cir. 2008) 1

United States v. Pendergraft (*Spielvogel I*), 297 F.3d 1198 (11th Cir. 2002) 6, 8, 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) 15

United States v. Spielvogel (*Spielvogel II*), No. 03-13135, 99 Fed.Appx. 881 (11th Cir. Mar. 3, 2004) 8

United States v. Spielvogel (*Spielvogel III*), No. 03-13135, 133 Fed.Appx. 738 (11th Cir. Mar. 14, 2005) 8

United States v. Westcott, 83 F.3d 1354 (11th Cir. 1996) 12

STATUTES

18 U.S.C. § 2 12

18 U.S.C. § 1001 12

18 U.S.C. § 1623 12

28 U.S.C. § 636 15

28 U.S.C. § 636(b)(1) 15

28 U.S.C. § 1254 1

28 U.S.C. § 2255 ..... 2, 3, 9, 10

Federal Magistrate's Act 14

RULES

Fed.R.Civ.P. 72 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, Offense Instruction 32 and Offense Instruction 50 12

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, MICHAEL SPIELVOGEL, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is styled *United States v. Michael Spielvogel,* 264 Fed.Appx. 823 (11th Cir. 2008), and was unreported. A copy is included in the attached appendix. The Eleventh Circuit denied rehearing April 18, 2008. The appeal decision followed an order from the United States District Court that had granted Spielvogel a belated appeal, and a copy of that order is also included in the attached appendix.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its original decision on February 7, 2008. A timely motion for rehearing was filed and rehearing denied April 18, 2008. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law;

2. Article III, § 1, provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATEMENT OF THE CASE

On October 2006, the district court granted Spielvogel relief pursuant to 28 U.S.C. § 2255. The district court held that Spielvogel's attorney mistakenly believed, at the time of the direct appeal of the convictions and sentences in 2001, that Spielvogel had not been sentenced on Counts Four and Five, and therefore, that he could not challenge these convictions and sentences. The court found that Spielvogel had expressly asked his counsel to appeal all counts of the judgment and conviction. Therefore, the court

said, relying upon *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), that counsel's failure to appeal resulted in the denial of Spielvogel's right to appeal as to Counts Four and Five. The district court reasoned that *Jones v. Barnes*, 463 U.S. 745, 753-754 (1983), permits appellate counsel the discretion to choose which *issues* would be appealed, but does *not* grant appellate counsel the right to forego the appeal of any individual *count* of a multi-count judgment, so long as the defendant has insisted on an appeal as to all counts. On this reasoning, the district court granted Spielvogel a belated appeal despite having had a prior appeal on the merits of the case, a prior resentencing, and a prior resentencing appeal.

The district court granted Spielvogel the belated appeal that is the subject of this petition over the Government's objection that Spielvogel had already had an appeal and had in fact challenged the merits of Counts Four and Five by raising an argument against the exclusion of certain expert testimony, which argument, had it been successful, would have resulted in the reversal of the two counts, thus, the Government argued, Spielvogel had had his appeal as to all counts despite his appellate counsel's confusion over the effect of the judgment.

The remedy the district court fashioned for the § 2255 ineffective assistance of appellate counsel claim was to vacate the most recent judgment and sentence to permit an out-of-time appeal. The court set aside the judgment of conviction and sentence and

then reentered the judgments of conviction and the same sentence. Spielvogel then perfected his belated third appeal to the Eleventh Circuit.

The Eleventh Circuit was not happy with the district court's order granting belated appeal relief. At oral argument Judge Carnes expressed the view that nothing was right about the district judge's order and pointedly questioned the Government why it had not filed a cross-appeal of the order granting Spielvogel the belated appeal. The Government implied at oral argument that the failure to file a cross-appeal had been the result of a clerical error and joined in with Judge Carnes' assessment of the merits of the district court's order. Judge Carnes was not alone in his opinion that the district court's order was wrong; there appeared to be consensus among the panel at oral argument that Spielvogel should not have been given his belated appeal.

Spielvogel argued in his belated appeal that the district court had abused its discretion in excluding the testimony of an expert witness, a psychiatrist named Caddy, who had proffered his testimony at a pretrial *Daubert*[1] hearing before the Magistrate Judge. The magistrate judge issued a report and recommendation ("R&R") that the expert testimony be excluded. The district judge adopted the magistrate judge's R&R, which was subject to mandatory

---

[1] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

de novo review, without the benefit of a transcript of the testimony or argument made at the *Daubert* hearing before the magistrate judge, and excluded the proffered testimony without ever seeing a transcript to know what it was he was excluding.

At trial the Government opened the door to the excluded expert testimony on cross-examination of Mr. Spielvogel by expressly and repeatedly referring to the expert witness, his absence from the witness stand, and implying that the consultation with Dr. Caddy was an attempt to fabricate a psychiatric defense. Despite opening the door by its cross-examination, the district judge overruled Spielvogel's renewed argument to allow Dr. Caddy to testify.

On the first trial appeal the original appellate counsel, against whom the district court granted the belated appeal, included in the first appeal brief a very abbreviated argument based solely on an attempt to distinguish Eleventh Circuit precedent relating to psychiatric testimony in criminal cases, that the trial court had erred in excluding Dr. Caddy's testimony. This appellate argument was made without ordering and including in the record on appeal a transcript of the *Daubert* hearing in question and without bringing to the Court of Appeals attention that the district court had obviously not conducted the constitutionally required *de novo* review of the R&R before adopting the R&R, because the district court had adopted the R&R without the benefit of a transcript of the *Daubert* hearing to review.

Likewise, the Court of Appeals conducted its appellate review of the expert witness issue without the benefit of the transcript of the magistrate's *Daubert* proceeding, and summarily disposed of the issue in a footnote to its published opinion:

> 10. Spielvogel also contends that he should have been allowed to introduce evidence of his diminished capacity to negate his *mens rea*. Spielvogel offered the testimony of Dr. Glenn Ross Caddy, a forensic psychologist, to show that Spielvogel suffered from a personality disorder that made him easily intimidated. However, even if Spielvogel was truly afraid after his conversations with Cretul, this fear in no way shows that Spielvogel did not intend to lie when he made up details about Cretul's threats and reported them to the FBI and in his affidavit. The district court, then, did not abuse its discretion by barring Caddy's testimony. See *United States v. Cameron*, 907 F.2d 1051, 1067 (11th Cir. 1990).

United States v. Pendergraft, 297 F.3d 1198, 1212, n. 10 (11th Cir. 2002).

On his belated appeal Spielvogel attempted to argue the merits of the error in excluding Dr. Caddy's testimony, pointing out that Spielvogel had been denied his constitutionally mandated *de novo* review of the Magistrate Judge's R&R, and denied meaningful appellate review as well when the Court of Appeals previously decided the admissibility issue

without benefit of a transcript of the magistrate's hearing and the proffered testimony itself.[2]

The Government responded that the question was foreclosed by law of the case, because Spielvogel's prior appellate counsel, the very one against whom the district judge had granted the belated appeal, had included a summary argument against the exclusion of Dr. Caddy in the prior appeal – an argument, which, however, failed to argue that the Government had opened the door to the expert testimony irrespective of its otherwise admissibility and which also completely failed to address the lack of the constitutionally mandated *de novo* review of the record of the magistrate's proceeding.

At oral argument Spielvogel tried to convince the panel that law of the case cannot foreclose an issue that has not been decided, that is, neither the lack of *de novo* review nor the Government's opening the door had been presented or decided in the prior appeal, and alternatively if law of the case could somehow foreclose arguments that were not presented or decided in a prior appeal, after a belated

---

[2] Spielvogel also argued that the district court had erred in denying admission of the testimony after the Government opened the door by its cross examination of Mr. Spielvogel on Dr. Caddy. Spielvogel also argued that this was Spielvogel's only theory of defense, and to take this defense from him on this record, while allowing the Government to cross examine on it, amounted to a denial of fundamental due process and reversible error. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

appeal has been granted, that an exception must apply when the appellate court's prior decision itself was made based on an incomplete record, that is, without benefit of a transcript of the magistrate's proceeding at issue.

In its opinion which followed, the Court of Appeals noted that it had previously issued several opinions in this case. *United States v. Pendergraft* (*Spielvogel I*), 297 F.3d 1198 (11th Cir. 2002);[3] *United States v. Spielvogel* (*Spielvogel II*), No. 03-13135, 99 Fed.Appx. 881 (11th Cir. Mar. 3, 2004); and *United States v. Spielvogel* (*Spielvogel III*), No. 03-13135, 133 Fed.Appx. 738 (11th Cir. Mar. 14, 2005). The Court of

---

[3] This opinion sets forth the basic facts of the case and the miscarriage of justice which it involved. In sum, Michael Spielvogel was a business advisor to Dr. James Pendergraft, a Black doctor nationally known advocate for abortion rights, who owned and operated several abortion clinics in Florida. Dr. Pendergraft considered himself on a personal mission to provide, protect and expand abortion rights. He attempted to open an abortion clinic in Ocala, Marion County, Florida, an ultraconservative community in North Central Florida. The clinic was met with protests, threats and efforts by the local government to cause it to relocate. The local sheriff refused to provide or permit off duty officers to be employed to provide security for the clinic which led to litigation in federal court by Dr. Pendergraft to protect his patients rights to access to the clinic. Dr. Pendergraft ultimately sued the county over the conflict. His attempts to settle that litigation was labeled an extortion and charged as such in federal court. Mr. Spielvogel was also indicted on two counts alleging that statements he made in support of that litigation to protect the right of access were false and was convicted and sentenced on those false statement counts to 18 months imprisonment under mandatory *pre-Booker* guidelines.

Appeals, found itself in clear disagreement with the district court having granted Spielvogel this belated appeal and frustrated with the Government's failure to cross-appeal the district court order, simply held without explanation that this argument had been addressed on the merits in *Spielvogel I*, therefore the law of the case foreclosed its presentation in the belated appeal. That is the question for this certiorari petition.

REASONS FOR GRANTING THE WRIT

I. WHETHER IN THE CONTEXT OF A BELATED APPEAL GRANTED UNDER 28 U.S.C. § 2255, LAW OF THE CASE BARS DECISION OF AN ARGUMENT NOT PRESENTED IN THE PRIOR DIRECT APPEAL?

The district court granted Spielvogel a belated appeal reasoning that his original appellate lawyer, while filing an appeal in form, had in fact failed to challenge two of Spielvogel's counts of conviction despite Spielvogel's direction that he appeal all of the counts of conviction. In so ruling the district court adopted a novel argument presented by Spielvogel's habeas attorney – that although *Jones v. Barnes* commits to the appellate attorney the decision which *issues* are to be appealed, it does not thereby commit to the attorney the discretion to simply not appeal an independent count of conviction, at least not when the defendant has requested an appeal.

The district court reached that decision despite its knowledge that the prior appellate counsel had presented a perfunctory, abbreviated argument in the original appeal to the effect that the district court had erred under Eleventh Circuit precedent in excluding the expert testimony at issue in this petition.

Once Spielvogel had his right to a belated appeal by virtue of the district court's order granting the belated appeal under § 2255, the onus was on the Government to appeal that order if the Government thought the order was wrong. It could not wait for the belated appeal and then simply argue that the question was barred by law of the case.

In any event, the issues presented by Spielvogel's belated appeal were in no wise governed by the law of the case doctrine, properly applied. Adherence to the law of the case decrees that the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal. The doctrine is not as rigid as *res judicata*, and does not bar consideration of matters that could have been, but were not, resolved in earlier proceedings. *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 652 (1988). Law of the case preclusion is limited to those issues previously decided and to issues decided by necessity.

The issues Spielvogel argued in his belated appeal – (1) that he never received the constitutionally mandated *de novo* review of the magistrate's R&R, (2) that the Government opened the door to admission of the contested expert testimony, and (3) that because it was Spielvogel's only defense, it was a denial of due process to exclude the expert testimony – were not presented or decided in the prior appeal and were not decided by necessary implication in the earlier appeal, hence they were not precluded by law of the case.

Even if law of the case could be viewed as excluding these issues in the context of a belated appeal it makes no sense to apply law of the case, and by definition, law of the case doctrine must not be applied in the context of a belated appeal because to do so would work a manifest injustice.

II. WHETHER LAW OF THE CASE FORECLOSES AN ISSUE THAT WAS PREVIOUSLY DECIDED WITHOUT BENEFIT OF A COMPLETE RECORD, THAT IS, WITHOUT BENEFIT OF A TRANSCRIPT OF THE MAGISTRATE JUDGE'S EVIDENTIARY HEARING AT ISSUE?

Spielvogel put the Government on notice of his intent to present psychiatric testimony by Dr. Glenn Ross Caddy on Spielvogel's statement of mind and his ability to form the specific intent to commit the

charged crimes.[4] [27-9] In response the Government filed a motion *in limine* to exclude the testimony [27], and an evidentiary hearing was conducted before the Magistrate Judge prior to trial. [43]

The Magistrate Judge issued a report and recommendation ("R&R") four days after the hearing recommending that the Government's motion to exclude Dr. Caddy's testimony be granted. [44] The defense filed a timely written objection to the R&R arguing that Dr. Caddy's testimony at the hearing was admissible under the governing Eleventh Circuit standard presented in *Cameron*[5] and *Westcott*[6]:

> [E]vidence in the form of testimony of a qualified psychologist who has examined the defendant is admissible where it focuses on the defendant's specific intent at the time the offense was committed and not on behavior or disorders which simply provide excuse or justification for the conduct alleged to be criminal. . . . With all due respect to Judge Jones, Spielvogel asserts that Dr. Caddy's proffered testimony satisfies the dictates of Eleventh Circuit precedent at least in the

---

[4] Spielvogel was charged in count four with perjury in violation of 18 U.S.C. § 1623 and § 2, and in count five with false statement in violation of 18 U.S.C. § 1001. Both are specific intent crimes. *See* ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, Offense Instruction 32 and Offense Instruction 50.

[5] *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990).

[6] *United States v. Westcott*, 83 F.3d 1354 (11th Cir. 1996).

> context of a pre-trial determination of its admissibility . . .

[49-3]

Without ordering a transcript of the evidentiary hearing, the district judge adopted the R&R. [52] Fed.R.Civ.P. 72 provides that the objecting party is to order the transcript, but there is no comparable criminal rule, and in counsel's experience transcripts are automatically prepared after all evidentiary hearings in criminal cases referred to Magistrate Judges. The record does not reflect why that did not happen in this case.

The district court adopted the contested R&R from a Magistrate Judge who had taken 50 pages of proffered psychological testimony from the proposed defense expert witness, Dr. Glenn Caddy, at a *Daubert* hearing without having the benefit of a transcript of the hearing. This error went unobserved by Spielvogel's appellate counsel who did not move to supplement the record on appeal with the transcript of the contested hearing.

This omission in turn went unnoticed by the Court of Appeals which purported to decide the question of admissibility of expert testimony that had been excluded on the basis of an evidentiary hearing, the transcript of which was not in the record on appeal.

The only way to have properly adjudicated on appeal the merits of the admissibility of the testimony

of the psychiatric expert whose testimony was proffered in a *Daubert* hearing before a magistrate judge, and then excluded, was to review the transcript of that hearing and the proffered testimony. An appellate decision on this issue made without review of the record necessary to decide the issue cannot constitute a decision for purposes of law of the case.

III. WHETHER *DE NOVO* REVIEW OF THE RECORD OF A MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN A CRIMINAL CASE ON THE QUESTION OF THE ADMISSIBILITY OF EXPERT TESTIMONY AT TRIAL IS CONSTITUTIONALLY MANDATED AND REQUIRES THE DISTRICT COURT TO REVIEW A TRANSCRIPT OF THE EVIDENTIARY HEARING?

The district court erred in adopting the R&R which Spielvogel had objected, without reviewing a transcript of the evidentiary hearing. The R&R itself stated that it was recommending that the evidence be excluded "for the reasons explained in open court . . . " as well as the reasons set forth in the R&R. The question was whether the proffered testimony was admissible or not. This issue could not be determined under the required *de novo* review standard, without the district court reading the record to see what the testimony was.

Under the Federal Magistrate's Act (the "Act"), Congress vested Article III judges with the power to authorize a United States Magistrate Judge to

conduct evidentiary hearings. The relevant portion of this act is found at 28 U.S.C. § 636. A district court judge may designate a United States Magistrate Judge to conduct hearings, including evidentiary hearings, in order to submit proposed findings of fact and recommendations (*i.e.,* the R&R). 28 U.S.C. § 636(b)(1)(B). Within ten days after being served with a copy of the R&R, any party may file written objections to the proposed findings and recommendations. *Id.* Section 636(b)(1) also states that a judge of the court shall make a *de novo* determination of those portions of the R&R to which objection is made. 28 U.S.C. § 636(b)(1).

In *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), the Court upheld the constitutionality of this provision of the Act. The Court found that Congress adequately protected the Act against an Article III constitutional challenge by subjecting the Magistrate Judge's proposed findings and recommendations to a *de novo* determination by the judge, who then exercises ultimate authority to issue an appropriate order. 447 U.S. at 681, 100 S.Ct. at 2415. In *Jeffrey S. v. State Board of Education of State of Georgia,* 896 F.2d 507, 512 (11th Cir. 1990), the court stated that the *de novo* review requirement is essential to the constitutionality of section 636. The court further stated that section 636(b)(1)'s nonconsensual reference is saved from constitutional infirmity by the retention in the Article III judge of the ultimate adjudicatory power, to be exercised after assistance from and upon the recommendation of the

Magistrate Judge. *Id.* at 512-513 citing *Hall v. Sharpe,* 812 F.2d 644, 647 (11th Cir. 1987).

Accordingly, the *de novo* review is based in a realization that only the district court judge can constitutionally dispose of a matter such as that in the instant case. Spielvogel never received the constitutionally required *de novo* review, because the district judge adopted the R&R without reviewing the evidentiary hearing. This procedure was tantamount to delegating to the magistrate judge the authority to decide the question, and as such was in violation of Article III of the Constitution.

CONCLUSION

Based on the foregoing arguments, Petitioner Spielvogel respectfully requests this Honorable Court grant certiorari to decide each of the above three questions.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com Email

264 Fed.Appx. 823

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael SPIELVOGEL, Defendant-Appellant.

No. 06-16000.

Feb. 7, 2008.

William Mallory Kent, Law Office of William Mallory **Kent**, Jacksonville, FL, for Defendant-Appellant.

Peggy Morris Ronca, Orlando, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 00-00021-CR-OC-32-GRJ.

Before BIRCH, CARNES, and COX, Circuit Judges.

PER CURIAM:

Michael Spielvogel challenges on this appeal his convictions on Counts Four and Five of the indictment, and the sentences he received on these counts.

We previously have reviewed Spielvogel's case. On October 2006, however, the district court granted Spielvogel relief pursuant to 28 U.S.C. § 2255. More specifically, the district court held that Spielvogel's attorney mistakenly believed, at the time of the direct appeal of the convictions and sentences in 2001, that Spielvogel had not been sentenced on Counts Four and Five, and therefore, that he could not challenge

these convictions and sentences. And, the court found, Spielvogel expressly asked his counsel to appeal. Therefore, the court said, relying upon *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), that counsel's failure to appeal resulted in the denial of Spielvogel's right to appeal as to Counts Four and Five. The remedy the § 2255 court fashioned was to vacate the most recent judgments and sentences to permit an out-of-time appeal. The court set aside the judgments of conviction and sentences and then reentered the judgments of conviction and the same sentences. (Opinion and order, R.6-379 at 1-14.) This appeal follows.

We have previously issued several opinions in this case. *United States v. Pendergraft (Spielvogel I),* 297 F.3d 1198 (11th Cir.2002); *United States v. Spielvogel (Spielvogel II),* No. 03-13135, 99 Fed.Appx. 881 (11th Cir. Mar. 3, 2004); and *United States v. Spielvogel (Spielvogel III),* No. 03-13135, 133 Fed.Appx. 738 (11th Cir. Mar. 14, 2005).

Spielvogel raises issues on this appeal that this court has addressed in previous opinions. We conclude that many of the issues raised are foreclosed by the law of the case.

Spielvogel contends that the district court erred at his resentencing by enhancing his sentence under USSG § 3C1.1 for obstruction of justice. Spielvogel's counsel appealed following resentencing pursuant to the mandate in *Spielvogel I,* and we addressed and rejected on the merits this enhancement argument in

Spielvogel II. "The law of the case doctrine (and, by implication, the mandate rule) applies to findings made under the Sentencing Guidelines." *United States v. Amedeo,* 487 F.3d 823, 830 (11th Cir.2007). The § 2255 court's order did not find his counsel on this appeal following resentencing to be deficient.

Spielvogel also contends that the district court abused its discretion in excluding the testimony of Dr. Caddy. His counsel made this argument – which related to all the counts – in his first appeal. We addressed it on the merits in *Spielvogel I*. The law of the case forecloses its presentation here.

Spielvogel argues that his convictions on Counts Four and Five were tainted by the spill-over prejudice from the Government's argument that his false statements were motivated by the intention to commit the crime of extortion, a crime which this court found was not supported by the facts of this case. Given the fact that the § 2255 court found that Spielvogel was deprived of his right to appeal his Count Four and Count Five convictions, we will assume arguendo that the law of the case and mandate rules do not foreclose this argument. The argument is meritless. Evidence of conduct establishing motive for the offenses of conviction is relevant.

Lastly, Spielvogel contends: that there is plain error under *Booker*; that the *Booker* remedy is itself unconstitutional; that under *Booker* we should review his sentence for reasonableness; and that his sentence is unreasonable. *United States v. Booker,* 543

U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We reviewed Spielvogel's sentence in *Spielvogel II* and *Spielvogel III,* however, and he presented none of these arguments in those appeals. We explicitly said in *Spielvogel III* that "Spielvogel has abandoned his *Apprendi/Blakely/Booker* issue." No. 03-13135, slip op. at 4. Nothing in the § 2255 court's order requires that we revisit a sentence we affirmed in *Spielvogel II* and *Spielvogel III,* and the sentence before us is the same sentence. These arguments are also barred by the law of the case. *See United States v. Escobar-Urrego,* 110 F.3d 1556, 1560-61 (11th Cir.1997) (holding that an issue not raised on direct appeal of sentence is barred by the law of the case from presentation in a subsequent appeal).

Spielvogel's convictions and sentences are **AFFIRMED**.

CARNES, Circuit Judge, concurring:

I concur in the result. Because the Court's opinion is not inconsistent with what I am about to say, I concur in it as well.

The issue of whether the district court should have granted Spielvogel relief on one of the claims raised in his 28 U.S.C. § 2255 petition without addressing all of the other claims in that petition is not before us, because there was no appeal from the § 2255 order. Nonetheless, the practice is not a good one. While the rule in *Clisby v. Jones,* 960 F.2d 925,

935-36 (11th Cir.1992) (en banc), by its terms applies to 28 U.S.C. § 2254 petitions, its reasoning applies with full force to § 2255 petitions too. It has been more than six years since Spielvogel was first sentenced, more than four years since he was resentenced, and the case has been up and down the appellate ladder three times. Now that we have denied relief in this out-of-time appeal, Spielvogel will go back to the district court and insist that the other claims in the § 2255 petition, which he filed nearly two years ago, be decided. If he is not granted relief on those claims, he will probably file yet another appeal. Enough is enough. The district court ought to grant or deny relief, as appropriate, on every remaining claim in the § 2255 petition so that this case can be brought to a close.

Although the issue is not before us, I would not want the inference to be drawn that this Court approves the district court's reasoning in concluding that Spielvogel had been denied effective assistance of counsel in his first direct appeal because his attorney did not raise any issues related to his conviction on counts four and five of the indictment. The district court's reasoning was that the non-strategic failure to raise any issue at all about a particular count of conviction was equivalent to the failure to file any appeal at all insofar as dispensing with a showing of prejudice is concerned. Putting aside the fact that the district court's factual premise is wrong-appellate counsel did raise one issue involving both counts four and five – the legal premise is wrong. The rule in *Roe*

v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), does not apply to an appeal in which some but not all possible issues are raised. It applies to the failure to file an appeal from the judgment and raise any issue at all. *Id.* at 483, 120 S.Ct. at 1038 ("According to respondent, counsel's deficient performance deprived him of a notice of appeal and, hence, an appeal altogether. Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a fair judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether."); *see Gamble v. Sec'y, Fla. Dep't of Corr.,* 450 F.3d 1245, 1249-50 (11th Cir.2006) (applying *Strickland* prejudice requirement to habeas petitioner's claim that his appellate counsel was constitutionally ineffective for failing to raise one issue in direct appeal of his state capital murder conviction and affirming denial of relief); *Coulter v. Herring,* 60 F.3d 1499, 1506 (11th Cir.1995) (rejecting habeas petitioner's claim that his counsel was constitutionally ineffective for failing to raise an issue during direct appeal of his conviction because petitioner did not show prejudice under *Strickland*).

By extension, the district court's reasoning would eviscerate the prejudice requirement of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because a defendant could always argue that the failure of his counsel to raise an issue is equivalent to not having any representation at all insofar as that issue is concerned. The district court

seems to have been operating under the misunderstanding that an appellant has a right to have his counsel raise on appeal any issue that the appellant wants. That is not so. *See Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

All of this that I say is dicta because the government did not appeal the grant of the out-of-time appeal in the § 2255 proceeding, but dicta can serve some valid purposes. *See McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1314-15 (11th Cir.1998) (Carnes, J., concurring specially) ("Dicta has its place and serves some purposes. Somewhat like statements in a law review article written by a judge, or a judge's comments in a lecture, dicta can be used as a vehicle for offering to the bench and bar that judge's views on an issue, for whatever those views are worth." (citation omitted)). In any event, the point is that this Court is not, by implication, approving any of the decisional steps that led to the out-of-time appeal which we are deciding today.

Finally, I assume that to the extent the district court's order that Spielvogel be released "during the pendency of his appeal" has any continuing effect, the district court will reconsider it in light of the fact that his convictions and sentence have been affirmed and a presumption of finality applies. *See Barefoot v. Estelle,* 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92, 77 L.Ed.2d 1090 (1983) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence."); *Snowden v. Singletary,* 135 F.3d 732, 735

(11th Cir.1998) (same). Six years is a long time to be released following a valid conviction.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA	Case No. 5:00-cr-21-Oc-32GRJ
vs.	Case No. 5:06-cv-154-Oc-32GRJ
MICHAEL SPIELVOGEL	

ORDER[1]

(Filed Oct. 25, 2006)

This case is before the Court on defendant Michael Spielvogel's Motion to Vacate and Set Aside Defendant's Judgment of Conviction and Sentence pursuant to 28 U.S.C. § 2255 (Doc. 361 in the criminal case and Doc. 1 in the civil case).[2] Spielvogel, who is represented by counsel, has raised five separate grounds for relief and has filed a motion seeking to remain on bond under his current conditions of release pending a determination of this motion. The Court requested that the government respond only to the matter of bond and the issue of whether Spielvogel is entitled to a belated appeal as to Counts IV and

---

[1] Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

[2] Future docket number references herein are to the criminal file unless otherwise noted.

V due to ineffective assistance of counsel, an issue presented in Ground V of Spielvogel's motion.[3] The government has done so.

Following three hearings on this matter, including an evidentiary one at which Spielvogel's trial and appellate counsel, Daniel Brodersen, offered testimony, the Court finds Spielvogel is entitled to a belated appeal.

I. Background

On February 1, 2001 a jury returned a verdict finding Spielvogel guilty of all five counts of a five count indictment and finding his co-defendant, James Scott Pendergraft, guilty of the three counts in which he was charged (Counts I, II, III only). In advance of the sentencing hearing, the probation officer prepared a Presentence Investigation Report ("PSR") on both Spielvogel and his co-defendant, Pendergraft. While a few pages of Spielvogel's PSR make reference to his

---

[3] Spielvogel moved for leave to amend the § 2255 motion in advance of actually filing it, explaining that he had just retained counsel experienced in federal habeas matters who may want to supplement or amend the motion then being filed by his personal attorney who had no experience with these matters. As stated above, the Court and the parties have focused their attention on one particular issue presented in Ground V and the Court has received and considered supplemental briefing on that issue. The Court has therefore not needed to explore whether any of the other grounds are meritorious or in need of amendment or supplementation and, in light of the result reached here, the motion to amend (Doc. 360) is moot.

conviction on all five counts, the PSR did not include calculations for Counts IV or V in the Offense Level Computations (see pages 12-14[4]).

The predecessor judge held a sentencing hearing on May 24, 2001 during which he referenced that Spielvogel had been convicted of all five counts. *See* Doc. 187 (sentencing transcript) at 5 (noting jury's verdict of guilty of all five counts); at 60 (stating that Spielvogel's two additional offenses "don't factor into the guideline calculation as such" but would be considered for purposes of minor role assessment). The Court sentenced Spielvogel to a term of 41 months, but did not announce whether the same term was being imposed for each count of the indictment.[5] *Id.* at 91-92. Pendergraft received a single sentence of 46 months. Shortly thereafter, the Court entered a Judgment in a Criminal Case (Doc. 152) which states that Spielvogel was found guilty on Counts I, II, III, IV and V and that he was thereby "committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months." Doc. 152 at 1-2.

---

[4] The PSR is not part of the public record but has been provided to the Court and will travel with the file for appellate purposes. It was referred to by the parties at the June 2, 2006 hearing and the Court admitted it into evidence at that hearing as Exhibit 4 (*see* Doc. 372).

[5] The PSR explained that Counts I, III, IV and V carried a maximum term of imprisonment of 5 years and that Count II carried a maximum term of imprisonment of 20 years (*see* PSR at 21); thus the same 41 month sentence could have been imposed for each of the five counts, to run concurrently.

(Pendergraft's judgment is Doc. 151.) Spielvogel and Pendergraft voluntarily surrendered to the Bureau of Prisons in July 2001. Docs. 188, 192.

Spielvogel and Pendergraft both appealed their convictions and sentences. In Spielvogel's initial brief to the Eleventh Circuit, Daniel Brodersen, who was Spielvogel's trial and appellate counsel, wrote that "Spielvogel was not sentenced on Counts IV and V." Doc. 6 in the civil case, Ex. A at 6. In its answer brief, the government noted that Spielvogel was not challenging the sufficiency of the evidence as to Counts IV and V. *Id.*, Ex. B at 28. In Spielvogel's reply brief, Brodersen explained that he was including new arguments addressed to the validity of Counts IV and V because "[a]lthough Spielvogel was not sentenced for his convictions on counts four and five, he does, in fact, challenge their validity." *Id.*, Ex. C at 2 n.*. On motion of the government, the Eleventh Circuit struck the new arguments challenging Counts IV and V because those issues had not been raised in the initial brief.

On February 27, 2002, on Order from the Eleventh Circuit, the Court directed that Spielvogel and Pendergraft be released from custody pending resolution of the appeal. On July 16, 2002, the Eleventh Circuit issued its decision on the appeals, acquitting Spielvogel and Pendergraft of all but one aspect of the Count I charge and remanding for a new trial on the remaining portion of that Count (a charge of conspiracy to commit perjury); acquitting both defendants of the charges in Counts II and III; and

affirming Spielvogel's convictions on Counts IV and V, the legal sufficiency of which the court noted Spielvogel had not challenged. *United States v. Pendergraft,* 297 F.3d 1198, 1205, n.4, 1212-13 (11th Cir. 2002). However, due to what the Eleventh Circuit characterized as the "technical error" of the District Court having handed down a single sentence rather than a sentence that individually addressed each count and the failure to specify whether the terms were to run consecutively or concurrently, the Eleventh Circuit remanded for resentencing of Spielvogel on Counts IV and V, to occur after the Count I conspiracy to commit perjury charge was resolved. *Id.* at 1212.

Upon remand, the case was reassigned to the undersigned in October 2002 and, following some further motion practice, the Court dismissed the Count I charge against Spielvogel on motion of the government, thereby leaving only the matter of resentencing on Counts IV and V as to Spielvogel (at that point, Pendergraft was still due to be retried on Count I). *See* Docs. 249, 251.[6] During a presentencing telephone conference on January 30, 2003, in response to an inquiry regarding the scheduling of Spielvogel's resentencing, Brodersen told the undersigned that

---

[6] Later, the government dismissed Count I as to Pendergraft and allowed him to plead guilty to a substantially lesser charge which did not require him to serve more prison time.

> Mr. Spielvogel, I guess, is – you could refer to it as a quirk – was never really sentenced on Counts IV and V. The presentence investigation and the presentence report did not address Counts IV and V independently. And Judge Hodges, in the initial sentencing of the defendant, did not – did not impose a sentence on Count IV and V.

Doc. 372, Ex. 1 at 15. Then again in May 2003, at a second presentencing hearing, Brodersen reiterated this position, explaining that Spielvogel "had not been [previously] sentenced on Counts IV and V" and that he therefore "didn't even have the right to appeal . . . the conviction on those counts." *See* Doc. 332 (transcript) at 5. Upon further inquiry from the Court as to why Brodersen believed Counts IV and V were not subjects of the first appeal, Brodersen elaborated:

> I did not address the convictions on counts four and five in any respect whatsoever in the initial brief [to the Eleventh Circuit]. I attempted to raise them in the reply brief *because Mr. Spielvogel urged me to.* He was incarcerated at the time. And we had a long telephone conversation and the government moved to strike [the Count IV and V arguments raised in the reply brief] . . . and the [Eleventh Circuit] struck them . . . [s]o, I was never able to make – perhaps – and again, as I said before, *perhaps through my own mistakes I was never able to argue the merit of his convictions on counts four and five, and therefore they were never considered by the Court of Appeals.*

Id. at 8-9 (emphasis supplied). On June 3, 2003, pursuant to the Eleventh Circuit's mandate, the Court re-sentenced Spielvogel on Counts IV and V to a term of imprisonment of eighteen months as to each count, to be served concurrently, with credit for time served, followed by two years of supervised release. Doc. 278. Spielvogel promptly filed a notice of appeal of his conviction and sentence on Counts IV and V. Over the government's objection, the Court permitted Spielvogel to remain on bond pending appeal. Doc. 283.

In Spielvogel's initial and reply briefs filed with the Eleventh Circuit in his appeal of the June 3, 2003 Amended Final Judgment as to Counts IV and V, Brodersen explained that although Spielvogel had been convicted on Counts IV and V at trial, Spielvogel was never sentenced on those counts until the June 3, 2003 proceeding and that he should therefore be permitted to challenge not only his sentence but those convictions as well in the context of the then pending appeal. *See* Doc. 6 in the civil case, Ex. H at 4, Ex. J at 2. The government moved the Eleventh Circuit to dismiss the portion of the appeal challenging Spielvogel's convictions on Counts IV and V, arguing that those convictions had been affirmed in the Eleventh Circuit's July 16, 2002 decision in *United States v. Pendergraft,* 297 F.3d 1198 (11th Cir. 2002). On June 2, 2004, the Eleventh Circuit issued as mandate its decision that "the district court was not authorized to reconsider the underlying validity of Spielvogel's convictions" on Counts IV and V and affirming

Spielvogel's sentence on Counts IV and V. Doc. 317 at 3, 6. This Court permitted Spielvogel to remain on bond while he sought further review before the Eleventh Circuit and the United States Supreme Court based on the then new *Blakely* decision. *See* Order, Doc. 340.

Finally, on December 5, 2005, the United States Supreme Court denied Spielvogel's petition for rehearing and, following review of status reports filed by the parties at the Court's behest, the Court issued an Order on April 10, 2006, directing Spielvogel to report to the Bureau of Prisons by May 1, 2006 to commence service of the remainder of his sentence. On April 25, 2006 Spielvogel filed the § 2255 motion that is presently before the Court, Ground V of which argues that Spielvogel is entitled to file a belated appeal as to Counts IV and V based on ineffective assistance of counsel. Spielvogel also filed a motion to remain on bond pending decision on the motion. The Court has permitted Spielvogel to remain on his current terms of release pending further Order.

On June 2, 2006, the Court held an evidentiary hearing on the § 2255 motion at which Brodersen was questioned regarding his decision not to appeal Counts IV and V to the Eleventh Circuit. Brodersen testified:

> I will say *Mr. Spielvogel disagreed wholeheartedly with my opinion in that regard.* But I also was under the impression, perhaps mistaken, that because Counts Four and Five had not been included in the

> sentencing, or in the initial PSI [sic] that was utilized by Judge Hodges when he sentenced Mr. Spielvogel, and were not referred to specifically in the judgment and sentence, that it perhaps was not – they weren't ripe for appeal. And that was an opinion that I had.

Doc. 375 at 19 (emphasis added). When the Court asked Brodersen what he thought had happened to Counts IV and V if they had not been fully resolved for purposes of taking an appeal, Brodersen explained that he "thought they were in limbo, so to speak," *id.* at 41, and that the Eleventh Circuit "would perhaps address what [the status was] of Counts Four and Five" in its opinion on the appeal of Counts I, II, and III. *Id.* at 42. Brodersen also testified that he did not think the appellate issues as to Counts IV and V were particularly meritorious but he did not consider filing an *Anders* brief and did not believe that the arguments related to Counts IV and V were frivolous. *See Id.* at 19-20, 32, 36-37. Brodersen testified that although he did not believe there were meritorious issues as to Counts IV and V, he could not say whether he would have included arguments as to Counts IV and V in his initial appellate brief "had [he] not had the mistaken belief" that his client had not yet been sentenced on those counts. *Id.* at 41.

II. Analysis

Under *Strickland v. Washington,* 466 U.S. 668, 694 (1985) a defendant claiming ineffective assistance

of counsel must show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant. Here, Spielvogel argues that his trial and appellate counsel, Daniel Brodersen, rendered ineffective assistance when, contrary to Spielvogel's express wishes, Brodersen failed to appeal Spielvogel's convictions on Counts IV and V following the jury's guilty verdict and the Court's entry of judgment in a criminal case on May 30, 2001.

The decision to take an appeal rests with the defendant and counsel's representation falls below the standard of reasonableness for purposes of *Strickland* where counsel fails to file a requested appeal. *Roe v. Flores-Ortega,* 528 U.S. 470, 477 (2000) (citing *Rodriquez v. United States,* 395 U.S. 327 (1969)). In such circumstances, *Strickland*'s prejudice showing is presumed and the defendant need not additionally show that his appeal would have had merit. *Id.*; *Gomez-Diaz v. United States,* 433 F.3d 788, 792 (11th Cir. 2005) (citing *Flores-Ortega* and explaining that "a defendant who shows that his attorney has ignored his wishes and failed to appeal his case need only demonstrate that, but for the attorney's deficient performance, he would have appealed").

Spielvogel's convictions and sentence on Counts IV and V were included in the Court's May 30, 2001 original Judgment in a Criminal Case (Doc. 152). The evidence is undisputed that Spielvogel wished to appeal his convictions and sentence on Counts IV and

V and communicated his desire to his lawyer, Brodersen.[7] Further, there is no dispute that Brodersen mistakenly believed that Spielvogel could not appeal his convictions on Counts IV and V and Brodersen did not include any issues related to Counts IV and V in the initial appellate brief.[8] That Brodersen also believed those issues were not particularly meritorious is beside the point for purposes of showing ineffective assistance on appeal under *Strickland* using the *Flores-Ortega* analysis.

The government argues, however, that, unlike *Flores-Ortega* or *Gomez-Diaz,* here, Spielvogel's counsel *did* file an appeal, and a very successful one at that, resulting in his acquittal on two counts, and his partial acquittal on a third. Therefore, the government contends Spielvogel's claims are not appropriately addressed under a *Flores-Ortega* analysis and should instead be considered under the traditional *Strickland* ineffective assistance test, which requires a showing of both deficient performance and prejudice. Because effective appellate advocates are expected to winnow out weaker arguments, even when they might be meritorious, appellate counsel

---

[7] Further solidifying this point, Spielvogel apparently negotiated a settlement with Brodersen's law firm of a malpractice claim related to Brodersen's failure to appeal Counts IV and V. *See* Doc. 375 (June 2, 2006 hearing transcript) at 29-30.

[8] Some of the issues raised, however (such as the alleged error in excluding a diminished capacity defense), applied generally to all counts.

does not perform deficiently merely by failing to raise every non-frivolous issue on appeal, provided that the strategic decision not to raise a particular issue was reasonable under the circumstances. *Jones v. Barnes,* 463 U.S. 745, 753-54 (1983). *Cf. Heath v. Jones,* 941 F.2d 1126, 1130-31 (11th Cir. 1991) (finding appellate counsel performed deficiently by raising one issue in a six page brief in a highly publicized capital case). Additionally, to meet the prejudice prong in the appellate counsel context, a petitioner must demonstrate that "appellate counsel's performance was sufficiently deficient to deprive the defendant of . . . an appeal whose result was reliable." *Heath,* 941 F.2d at 1132 (citation and quotation omitted). To reach such determination, "the Court must . . . review the merits of the omitted or poorly presented claim" and then determine whether "the neglected claim would have a reasonable probability of success on appeal." *Id.* The government argues that here Spielvogel has failed to meet either prong because Brodersen properly left out less meritorious issues related to Counts IV and V and focused his attention on grounds which met with great success, resulting in acquittals on some counts and the later dismissal of the remainder of another.

It is of course true that Brodersen brought a highly successful appeal on Spielvogel's behalf as to Counts I, II and III. But his decision not to appeal Counts IV and V was not a strategic decision made to winnow out weaker issues. Rather, Brodersen failed to appeal Counts IV and V because of a mistaken

belief that Spielvogel had not yet been sentenced on those counts. On these facts,[9] and in the face of his client's express request that Brodersen appeal Counts IV and V, his failure to do so has resulted in the denial of Spielvogel's right to an appeal as to Counts IV and V.[10]

The Court therefore finds that Ground V of Spielvogel's § 2255 motion is meritorious and Spielvogel is therefore entitled to a belated appeal as to

---

[9] Neither party has cited a case directly on point and the Court has found none.

[10] That the Eleventh Circuit discussed Counts IV and V in certain parts of its opinion does not detract from this determination. First, the Eleventh Circuit explained in the opinion that Spielvogel was not challenging the legal sufficiency of Counts IV and V. *Pendergraft,* 297 F.3d at 1205, n.4. Indeed, the legal sufficiency of Counts IV and V (because of an alleged failure to plead materiality) were two of the precise issues Spielvogel raised in his motion for judgment of acquittal (*see* Doc. 129) and then failed to raise on appeal. Moreover, Brodersen's efforts to raise these same arguments as to Counts IV and V were struck from his reply brief on Order of the Eleventh Circuit. *See* Doc. 6 in the civil case, at Ex. C, F, G. While true that the Eleventh Circuit discussed the factual basis of Counts IV and V, the discussion was in the context of an issue related to prosecutorial comments (*see Pendergraft,* 297 F.3d at 1212). Those statements do not necessarily address the materiality issues that Spielvogel raised in his motion for judgment of acquittal and, even if they do, given the footnote 4 comment referenced above, this Court is not in a position to determine definitively that the Eleventh Circuit has addressed Counts IV and V such that an appeal should not be permitted. Neither is it clear that the Eleventh Circuit's June 4, 2004 decision (Doc. 317) decides this issue. That is ultimately a matter for the Eleventh Circuit to decide.

Counts IV and V. The Court will deny without prejudice as premature all remaining grounds until the appeal of Counts IV and V is decided.[11]

Finally, in light of the alleged error Spielvogel intends to pursue on appeal, as well as his record of good compliance with his conditions of release, the Court further finds that, given the length of time remaining on the term of imprisonment the Court imposed, this appeal could be rendered meaningless if Spielvogel were required to be imprisoned during the pendency of an appeal. Therefore, notwithstanding the government's objection, pursuant to 18 U.S.C. § 3143(b), the Court will permit Spielvogel to remain on conditions of release during the pendency of his appeal. *See United States v. Giancola,* 754 F.2d 898 (11th Cir. 1985).

Accordingly, it is hereby

ORDERED:

1. Michael Spielvogel's Motion under 28 U.S.C. § 2255 to Vacate and Set Aside Defendant's Judgment of Conviction and Sentence (Doc. 361 in the criminal case and Doc. 1 in the civil case) is **GRANTED** on Ground V to the extent that Spielvogel seeks an out of time appeal; the remainder of the

---

[11] A successful § 2255 motion which secures a belated appeal "does not render subsequent collateral proceedings 'second or successive.'" *McIver v. United States,* 307 F.3d 1327, 1332 (11th Cir. 2002).

motion is **DENIED WITHOUT PREJUDICE** as premature before Spielvogel's direct appeal is decided.

2. The Amended Judgment in a Criminal Case as to Michael Spielvogel (5:00-cr-21-Oc-32GRJ, Doc. 278) is **VACATED**. By separate second amended Judgment, the Court will reimpose the same sentence. From the date that Judgment is entered, Spielvogel will have ten (10) days to file a notice of appeal.

3. Under *United States v. Phillips,* 225 F.3d 1198 (11th Cir. 2000), Spielvogel is further advised of his rights associated with an appeal from a criminal sentence:

a. It is your right to appeal from the sentence within ten days from the date of the reimposed sentence and judgment as dictated by Federal Rule of Appellate Procedure 4(b)(1)(A)(i). Failure to do so within ten days from that date means you have given up and waived your right to appeal. The government may also file an appeal from this sentence.

b. You are advised that you are entitled to assistance of counsel in taking an appeal. The Court assumes your current retained counsel will represent you on appeal and directs your counsel to file a timely notice of appeal from the second amended judgment. If retained counsel is not going to represent you on appeal, after filing the notice of appeal, he should file a motion to withdraw and ask the Court to appoint counsel upon a showing of your indigency.

4. Spielvogel's Motion for Bail Pending Habeas Corpus Relief (Doc. 363) is **GRANTED** to the extent that Spielvogel may remain on bond pending appeal, continuing on the same terms and conditions of release as are currently in effect. Spielvogel's First Amended Motion for Bond (Doc. 366) and Second Amended Motion for Bond (Doc. 373 in the criminal case, Doc. 4 in the civil case) are **MOOT**, the Court having granted the original motion.

5. Spielvogel's Request for Leave to Amend Petition Filed under 28 U.S.C. § 2255 and permission to file supplemental memorandum of law (Doc. 360) is **MOOT**.

6. Spielvogel's Request that Court Recommend Designation to Community Correction Center (Doc. 368) is **DENIED WITHOUT PREJUDICE** to renewal at an appropriate time.

DONE AND ORDERED at Jacksonville, Florida this 25th day of October, 2006.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:

Mark A. Devereaux, Esq. (AUSA-Jacksonville)
Frederick T. Lowe, Esq.
William Mallory Kent, Esq.

Michael Spielvogel

Eric Ordeneaux
U.S. Probation Officer (Ocala)

Donna L. Wiebe
U.S. Pretrial Services (Orlando)

Maurya McSheehy, CRD (Ocala)

United States Marshal Service

Bureau of Prisons

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16000-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL SPIELVOGEL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 18, 2008)

BEFORE: BIRCH, CARNES and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE